NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion #623 - 11/7/91 (38-90)

Topic: Closed files; disposition procedures; dissolution of law firm

Digest: Procedures for disposing of closed files; partners' ethical obligations are joint and several notwithstanding dissolution

Code: DR 1-102(A)(5), 4-101(B)(1), 4-101(D), 9-102(B), 9-102(D), 9-102 (G); EC 1-5, 4-4, 4-6, 7-1, 7-8, 7-11, 7-12

QUESTION

What procedures should a lawyer undertake when disposing of closed files and to what extent are those procedures affected by dissolution of the lawyer's firm?

OPINION

In N.Y. State 460 (1977), this Committee addressed the circumstances under which a lawyer properly may dispose of closed files. What follows elaborates our earlier opinion and considers in greater detail the procedures which should be undertaken by an ethically sensitive lawyer.

Where a file has been closed, except to the extent that the law may require otherwise, all documents belonging to the lawyer may be destroyed without consultation or notice to the client in the absence of extraordinary circumstances manifesting a client's clear and present need for such documents. Cf., e.g., N.Y. State 398 (1975); N.Y. City 1986-4 (1986). Absent a legal requirement or extraordinary circumstances, the lawyer's only obligation with respect to such documents is to preserve confidentiality. See DR 4-101(B)(1) and (D); also see EC 4-4, EC 4-6. Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact. See, e.g., 7 N.Y. Jur 2d §169.

With respect to documents that belong to the client, as a first step of general application, the lawyer should offer to make them available to the client. Preferably, that offer should be in writing and announce the lawyer's intent to dispose of the file. If the client fails to respond within a reasonable period of time or cannot be contacted (after reasonable efforts to do so have been undertaken by the lawyer), the lawyer may dispose of the file, including such documents as may belong to the client, subject to the qualifications and procedures hereinafter discussed.

If the lawyer has no reason to believe there are either any documents contained in the file that either the lawyer or the client is required by law to maintain or any documents that the client would foreseeably need to establish substantial personal or property rights (documents in need of salvaging, hereinafter collectively referred to as "DINS"), and the client fails to respond or provide instructions to the lawyer within a reasonable period of time, the file may be destroyed without further action on the part of the lawyer. In destroying the file, the lawyer should use means that will reasonably assure that whatever confidential material may be contained therein will not be compromised. See e.g., DR 4-101(B)(1) and (D); EC 4-6.

As we explained in Opinion 460:

The ethics of our profession do not cast upon lawyers the unreasonable burden of maintaining all files and records relating to their clients.

Those files and records that do not contain material for which the client ... foreseeably will have need [and which are not required by law to be further maintained], may be destroyed where they have been retained for a reasonable period of time after the lawyer has requested instructions for their disposition from his client, or his client's legal representative, and such instructions have not been received.

If the client responds to the lawyer's notice, and the lawyer has reason to believe that there are no DINS in the file, disposition of the file may be in accordance with the client's instructions. See, e.g., N.Y. County 624 (1974); also see, e.g., Fla. Op. No. 63-3 (1964), 38 Fla. B.J. 209 (1964), indexed at 715, O. Maru, Digest of Bar Association Ethics Opinions (1970) (hereinafter "Maru's Digest").

Where the lawyer has reason to believe that DINS might be in the file, the file should be inspected prior to communicating with the client concerning its disposition. Upon inspection of the file, all DINS should be identified. Any communication with the client concerning disposition of the file should note the existence of such documents and the need to preserve them. See, e.g., EC 7-8; compare EC 7-11 with EC 7-12 (relating to clients under a disability).

The obligation to inspect closed files is especially important where the lawyer is personally responsible for the preservation of the documents in question. Where such documents exist, ordinarily the lawyer will not be able to discharge the legal obligation to maintain them by transferring their possession to the client. In this connection, it is noted that lawyers occasionally are required by law to maintain certain documents for stated periods of time. See, e.g., DR 9-102(B) (formerly, in relevant part, 22 NYCRR §§603.15[a], 691.12[a] [Rules of the First and Second Departments prescribing the preservation of certain records required to be maintained by lawyers]; DR 9-102(D) (requiring retention of escrow account records for seven years). A lawyer should not deliberately or recklessly destroy such documents during the period that they are required to be retained; to do so would both violate the law and offend the ethics of our profession. See, e.g., DR 1-102(A)(5); EC 1-5. Hence, where the lawyer has reason to believe that such documents may be contained in a closed file, the lawyer has an obligation to examine the closed file for such documents before destroying it; and, absent specific judicial authorization, the lawyer may not deliver such documents to the client for safekeeping during the period that the lawyer is required to maintain them. See, e.g., EC 7-1.

If the client fails to take possession of the file or to provide the lawyer with appropriate instructions concerning its disposition within a reasonable period of time after being notified of the lawyer's intention to dispose of it, any DINS which the lawyer knows are contained in the file should be further maintained by the lawyer according to law and/or the reasonably foreseeable needs of the client. The balance of the file may be discarded, respecting the obligation to maintain confidentiality.

Documents that the law requires the client to maintain -- as distinguished from those that the lawyer is required to maintain -- present a different problem. If the lawyer is or becomes aware of the fact that such documents are contained in the file, the client should be so informed. If the client fails, refuses or is unable to recover the documents, the lawyer should attempt to forward same to the client. If that is not possible, the lawyer ethically may be obliged to retain the documents for the period prescribed by law.

Moreover, if the DINS are those which the client (as distinguished from the lawyer) is required by law to maintain or which the client will need to establish substantial personal or property rights, the lawyer may charge the client with the cost of further maintaining such documents, provided the lawyer has given the client notice of the lawyer's intention to do so. Upon expiration of the period of retention mandated by law or perceived need (as the case may be), the remaining DINS may be destroyed by the lawyer without further notice to the client.

In determining whether material should be classified as DINS on the basis of foreseeable need, the lawyer may consider whether the client previously has received duplicate originals. Although not necessarily dispositive of the issue, such prior receipt on the client's part will militate strongly against a finding of foreseeable need. Similarly, although not dispositive, where the document is required to be maintained by law, the period of retention prescribed may be regarded presumptively as the period of foreseeable need. N.Y. State 460, supra ("the period of preservation mandated by law will often provide a reasonable standard by which to assess future need").

Where the client is deceased or otherwise incapacitated to the extent that he cannot handle his or her affairs, the lawyer may deliver the closed file to the client's legal representative. N.Y. State 460, supra. Under such circumstances, it may be considered sound practice for the lawyer to instruct the client's representative concerning the breadth of the evidentiary privilege attaching to such documents. See, e.g., Fisch, New York Evidence, §530 (and cases cited therein). Even where the representative has been discharged, it may still be legally and ethically appropriate for the lawyer to consult with the representative concerning the disposition of closed files. Cf., e.g., Willets v. Haines, 96 App. Div. 5 (1st Dep't 1904), aff'd 182 N.Y. 543 (1905).

When a law firm dissolves or a lawyer retires from practice, additional questions arise concerning the disposition of closed files. Dissolution or retirement from practice clearly does not relieve the lawyer of a professional obligation to maintain closed files. See e.g., N.Y. State 460, supra; see also, EC 4-4, EC 4-6.

If the lawyer does not have personal knowledge of the closed files (so that the lawyer might reasonably be said to be in a position to know whether DINS are contained in any given file), on dissolution of the firm, it may be necessary to examine all closed files. Compare, e.g., N.Y. City 1986-4 (1986), N.Y. City 82-15 (1982 [published 2/6/85]), and ABA Inf. 1384 (1977) (general guidance on disposition of closed files) with Wis. Mem. Op. April 6, 1971, Wis.B.B. 58 (1974), indexed at 10250, 1975 Supplement to Maru's Digest (1977)(upon dissolution of law partnership, closed files should be examined to determine if there are documents or papers of value that should be returned to the clients, and insofar as possible, all past clients with files should be notified when they may reclaim such files); Fla. Op. No. 71-62 (1972), 1972 Fla. Op. 12, indexed at 8138, 1975 Supplement to Maru's Digest (1977)(when changing membership in professional association practicing law, instructions of client should be dominant consideration in disposition of files, whether open or closed; written inquiry should be sent requesting client's instructions).

The professional obligation to maintain closed files or to arrange for their disposition is not limited to those members of the firm who worked on the file when it was active. In N.Y. State 398 (1975), we held that, absent a special agreement to the contrary, the clients of a law partnership employ the firm as an entity and not a particular member of the firm. Consistent with that holding, the ethics committee of the Nassau County Bar Association determined that both partners of a two- member firm in dissolution were fully responsible to every client of the firm, and the lawyers' separate agreement to the contrary could not diminish each lawyer's responsibility to the clients of the firm. Nassau County 40-88 (1988). The recently amended provisions of DR 9-102(G) are also consistent with this principle of joint and several responsibility in requiring that "the former partners or members [of the firm in dissolution] shall make appropriate arrangements" for the maintenance of the records which the firm was required by law to maintain. Cf., e.g., Matter of Dahowski, 103 A.D.2d 354, 479 N.Y.S.2d 755 (2d Dep't 1984).

It is ethically immaterial that the economic burden of disposing of closed files may be far in excess of any practical benefit to the parties involved. As recently observed by the ethics committee of the Nassau County Bar Association, referring to a custodial attorney's release of files to the client of a deceased attorney:

It is no answer to the discharge of custodial counsels' obligations under the Code of Professional Responsibility to complain that the benefits of their passive custody of the documents are not commensurate with the present burdens. Such burdens do not follow solely from the attorney-client relationship, and are not dependent on the payment of fees; rather, the burdens of custody as prescribed by the Code are inherent in the lawyer's enjoyment of his professional status, and his concomitant obligations to the public generally. Once the burden is assumed, by actively (or passively) taking custody of funds or property belonging to any "client," those burdens must be fully discharged even if the benefits of the custody are minimal or non-existent.

Nassau County 43-89 (1989); see also, e.g., N.Y. State 398 (1975); N.Y. State 341 (1974); N.Y. City 87-74 (1988).

It should be emphasized that this opinion is not intended to create an ethical obligation to preserve files where none exists in law. Ultimately, the disposition of closed files is a matter which will come to rest on the sound judgment of counsel. Absent controlling principles of substantive law, when and under what circumstances clients ought to be consulted are essentially matters of judgment. Good practice, common sense and courtesy should remove as much uncertainty from the process as feasible, but the ethics of our profession suggest that a considerable amount of flexibility in articulating specific procedures is necessary. As noted by the ethics committee of the Association of the Bar of the City of New York:

We do not believe that there is any hard and fast rule as to when the client should be contacted, and good judgment should govern in making this decision. While an attorney is not ethically obligated to do so, the Committee believes that it is good practice to discuss with the client the retention and disposition of the files at the time of the termination of the matter, or, in appropriate circumstances when there is a continuing client relationship, at the conclusion of the representation. N.Y. City 1986-4, supra.

Consistent with the preceding statement and our desire to avoid hard-edged rules, this Committee offers this opinion for the general edification of the bar.